UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a Minnesota corporation and ST. PAUL GUARDIAN INSURANCE COMPANY, a Minnesota corporation,

Plaintiffs,

v.

HEBERT CONSTRUCTION, INC., a Washington corporation; MEADOW VALLEY, LLC, a Washington limited liability company; ROGER and SHELLY HEBERT, individually and the marital community thereof; HENRY and KAREN HEBERT, individually and the marital community thereof; ANDRZEJ and ROMA LAWSKI, individually and the marital community thereof; JAMES and ANNE KOSSERT, individually and the marital community thereof; and ADMIRAL INSURANCE COMPANY, a Delaware Company,

Defendants.

ADMIRAL INSURANCE COMPANY, a Delaware corporation,

Third-Party Plaintiff,

No. C05-388Z

ORDER

v.

SAFECO INSURANCE COMPANY, a Washington corporation, AMERICAN ECONOMY INSURANCE COMPANY, a Indiana corporation, and JOHN DOE INSURANCE COMPANIES 1-50,

Third Party Defendants.

This matter comes before the Court on Third-Party Defendants Safeco Insurance Company's ("Safeco") and American Economy Insurance Company's ("AEIC") motion for summary judgment, docket no. 57, Defendant/Third-Party Plaintiff Admiral Insurance Company's ("Admiral") cross-motion for summary judgment, docket no. 65, and AEIC's motion to strike, docket no. 70. Having reviewed the briefs, declarations, and exhibits thereto, the Court enters the following Order.

BACKGROUND

This case involves insurance coverage claims related to a condominium defect suit that has been adjudicated in King County Superior Court. The motions at issue here involve only the claims and counter-claims between the insuring parties AEIC/Safeco and Admiral. AEIC moves for a summary judgment order stating that it is entitled to a claim-bar against Admiral's claim for contribution. Safeco moves separately for dismissal on the grounds that it never issued an insurance policy related to this litigation.[1] In response, Admiral cross-moves for a summary judgment order stating that AEIC had a duty to defend and indemnify two entities that were mutually insured by both AEIC and Admiral and, as a result, that Admiral is entitled to equitable contribution. Finally, AEIC brings a motion to strike

[1] Acknowledging that there is no dispute that AEIC is the "real party in interest" in this litigation, Admiral states that it "does not oppose the dismissal of Safeco." Third-Party Pl.'s Opp., docket no. 61, at 2 n.1. Accordingly, Safeco's motion for summary judgment dismissal is GRANTED.

documents and statements for failure to provide authentication and citation. Third-Party Defs.' Opp., docket no. 70, at 2, 6-9.

The Underlying State Court Action

The claims, counter-claims, cross-claims, and affirmative defenses at issue in this case arise out of, or are closely related to, an underlying state court action involving construction defects. Compl., docket no. 1, ¶¶ 14-21; Answer, docket no. 15, ¶¶ 3-4; Answer, docket no. 22, ¶¶ 14-21. By way of the Complaint and respective Answers, the parties allege and admit the following facts regarding the state court action. On September 5, 2003, and November 24, 2004, the Meadow Valley Owners Association ("Association") filed complaints against two defendants based on alleged construction defects in a 78-unit condominium project known as Meadow Valley Condominium (the "Project"). The Association brought claims against Meadow Valley LLC ("MVLLC"), the developer of the Project, and Roger Hebert, the manager of MVLLC. In turn, MVLLC brought third-party claims against Hebert Construction, Incorporated ("HCI"), the general contractor for the Project, and HCI brought fourth-party claims against several of HCI's subcontractors, one of which is Interior Motives, Incorporated ("Interior").

On July 22, 2005, AEIC entered into a settlement agreement with the state court action defendants it insured, including MVLLC, HCI, and Interior. Knowles Decl., docket no. 60, at Ex. C (Settlement Agreement). The settlement released all claims for the sum of $115,000. Id. AEIC's alleged liability in the state court action was based on possible defense and indemnification obligations as an insurer for Interior, MVLLC and HCI from 2001 through 2004. See Knowles Decl., at Ex. A (Insurance Policies). On September 19, 2005, the Association entered into a stipulated judgment against MVLLC and HCI in the amount of $6,400,000.00. See Knowles Decl., at Ex. B (Stipulated Judgment).

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Claims Asserted in this Action

This case was initiated when Plaintiffs St. Paul Fire and Marine Insurance Company and St. Paul Guardian Insurance Company (collectively, "St. Paul") filed a declaratory judgment action seeking a judgment that they have no duty to defend or indemnify any of the state court defendants and a determination of their rights relative to Admiral. Compl., at pp. 8-9. St. Paul's Complaint was followed by counter-claims on behalf of both the state court defendants and Admiral, all of which also cross-claimed against one another. Answers, docket nos. 15, 22. Admiral also brought a third-party claim for contribution against Safeco and AEIC, which responded with their own counter-claim for a contribution claim-bar order. Docket nos. 51, 56. Only the third-party claims between Admiral and Safeco/AEIC are at issue in these motions for summary judgment.

Factual Basis for these Motions

Both AEIC and Admiral rely on various clauses in the policies they issued to MVLLC and HCI. AEIC issued a Business Owners Policy ("BOP") to MVLLC and HCI for the years 2001-2002, 2002-2003, and 2003-2004. Knowles Decl., at Ex. A (pp. 750, 862, 955). Under the "Coverages" heading, the AEIC policy states in relevant part as follows:

> **A. COVERAGES**
>
> **1. Business Liability**
>
> **a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . "property damage" . . . to which this insurance applies. However, we will have no duty to defend the insured against any "suit" seeking damages for . . . "property damages" . . . to which this insurance does not apply.

Id. at Ex. A (pp. 832, 909, 1011) (bold in original). Critical to this dispute, each of the AEIC policies include what are known as "Other Insurance" clauses, which state as follows:

> **H. OTHER INSURANCE**
>
> **1.** If there is other insurance covering the same loss or damage, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect

> on it or not. But we will not pay more than the applicable Limit of Insurance.
>
> **2.** Business Liability Coverage is excess over any other insurance that insures for direct physical loss or damage.
>
> **3.** When this insurance is excess, we will have no duty under Business Liability Coverage to defend any claim or "suit" that any other insurer has a duty to defend. If no other insurer defends, we will undertake to do so; but we will be entitled to the insured's rights against all those other insurers.

Id. at Ex. A (pp. 794, 925,1027) (bold in original).

In contrast, Admiral maintained a Commercial General Liability Coverage ("CGLC") policy in favor of MVLLC and HCI for the period from February 4, 2000, to February 4, 2001. Duany Decl., docket no. 62, Ex. A (Admiral Policy No. A00AG08147). Admiral's CGLC policy included a coverage provision that states in relevant part as follows:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for . . . "property damage" to which this insurance does not apply.

Id. at Ex. A (CG 00 57 09 99). As in AEIC's BOP policy, Admiral's CGLC policy included an "Other Insurance" clause, which states in relevant part as follows:

> **4. Other Insurance**
>
> If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:
>
> **a. Primary Insurance**
>
> This insurance is primary except when **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in **c.** below.
>
> **b. Excess Insurance**
>
> This insurance is excess over:
>
> **(1)** Any of the other insurance, whether primary, excess or contingent or on any other basis:

> **(a)** That is fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work."
>
> . . .
>
> **(2)** Any other primary Insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.
>
> When this insurance is excess, we will have no duty under Coverages A or B to defend in the insured against an "suit" if any other insurer has a duty to defend the insured against that "suit." If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

Id. at Ex. A (CG 00 01 07 98) (bold in original).

AEIC's Motion to Strike

In the opposition to Admiral's cross-motion for summary judgment, AEIC brings a motion to strike the following: (1) the copy of Admiral's insurance policy with MVLLC/HCI, (2) letters attached to the Duany declaration, and (3) all unsupported factual assertions in Admiral's motion. See Third-Party Defs.' Opp., at 6-9; Duany Decl., Exs. 1-3. AEIC is correct that the exhibits to the Duany declaration are not properly authenticated, as they are supported only by Admiral's attorney's assertion that they are "true and correct copies." See Orr v. Bank of America, 285 F.3d 764 (9th Cir. 2002) (reference to "true and correct copies" insufficient for authentication on summary judgment). However, in its Reply brief, Admiral includes the declarations of Thomas Foster, a Claim Superintendent for Admiral, and Douglas Weigel, an attorney for MVLLC in the state court action. These declarations authenticate both the copy of Admiral's insurance policy and the letters attached to the Duany declaration. Accordingly, the Court DENIES AS MOOT this portion of Admiral's motion to strike.

AEIC is also correct that Admiral included many factual statements in the "Statement of Facts" portion of its brief that are unsupported by citation to the record. In fact, nearly all of the "facts" stated by Admiral are without citation. For example, Admiral states that the

Association and state court defendants had entered into a $7.2 million settlement (later reduced to $6.4 million) before AEIC settled with the state court defendants. Admiral also states that it, along with the St. Paul insurance companies, paid approximately $800,000 to defend the state court defendants while AEIC paid nothing. Federal Rule of Civil Procedure 56(e) provides that "when a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, *by affidavits or as otherwise provided* in this rule, must set forth *specific facts showing that there is a genuine issue for trial*." (Emphasis added). While AEIC does not argue that the unsupported facts stated by Admiral are necessarily inaccurate, the factual assertions clearly do not conform with the standards of Rule 56. Therefore, the Court GRANTS IN PART this portion of AEIC's motion to strike because Admiral has failed to provide citations. For purposes of this motion, the Court will not consider the statements of fact in Admiral's brief (which are too numerous to list individually in this Order) that are unsupported by the declarations and exhibits in the record.

DISCUSSION

Summary judgment is appropriate when the movant demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). The party moving for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). Once the moving party meets its initial responsibility, the burden shifts to the non-moving party to establish that a genuine issue as to any material fact exists. Matsushita Elec. Indus.

Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The non-moving party must present significant probative evidence tending to support its claim or defense. Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991). Evidence submitted by a party opposing summary judgment is presumed valid, and all reasonable inferences that may be drawn from that evidence must be drawn in favor of the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

Under the law of Washington State, the interpretation of an insurance policy is a question of law. Grange Ins. Co. v. Brosseu, 113 Wn.2d 91, 95 (1989). An insurance policy "is construed as a whole, and 'should be given a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.'" Id. (citation omitted).

AEIC raises two central arguments in support of its summary judgment motion. First, AEIC contends that Admiral cannot recover on its contribution claim because the "Other Insurance" clause in AEIC's policy establishes, as a matter of law, that AEIC had no duty to defend or indemnify MVLLC/HCI. Second, AEIC argues that its July 2005 settlement of $115,000.00 with MVLLC/HCI bars Admiral's contribution claim. In its cross-motion, Admiral maintains that *its* "Other Insurance" clause establishes that it had no duty to defend or indemnify MVLLC/HCI but, instead, only AEIC had such obligations. In the alternative, Admiral argues that the two "Other Insurance" clauses are "mutually repugnant" under the law, meaning AEIC and Admiral must share the defense and indemnification costs (i.e., that Admiral is entitled to contribution from AEIC). In response to AEIC's "settlement bar" argument, Admiral contends that such settlements do not bar contribution claims and, even if they did, the settlements are subject to a "reasonableness" test that AEIC's settlement agreement with MVLLC/HCI cannot pass.

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I. Scope of Policy Coverage

The first issue is whether the "Other Insurance" clauses of the two policies—AEIC's BOP policy and Admiral's CGLC policy—entitles either party to claim that their coverage was "excess." Both AEIC and Admiral argue that their policies are excess and the other party's policy is primary, and Admiral raises the alternative argument that the "Other Insurance" clauses are mutually repugnant, cancelling one another out. AEIC argues that its BOP policy is excess for the following three reasons: (1) the AEIC BOP policy is narrower and does not contain the same scope of coverage as Admiral's CGLC policy, meaning the CGLC policy was meant to be primary; (2) a section of Admiral's "Other Insurance" clause states that Admiral's policy is excess if there exists other "p*rimary* insurance," while AEIC asserts that its BOP policy is not primary; and (3) the fact that AEIC and its insureds only intended the BOP policy to be "excess" is demonstrated by extrinsic evidence—namely, correspondence between an AEIC underwriter and Interior regarding the possibility of expanding coverage. In response, Admiral argues that its CGLC policy is excess because AEIC's BOP policy is primary, rendering Admiral's policy excess.

A. Scope of Coverage Comparison between the BOP and CGLC

AEIC first contends that Admiral's policy is primary because a CGLC policy, which AEIC describes as "a term of art" in the insurance industry, is broader and intended to provide greater coverage than a BOP policy. Third-Party Defs.' Opp., docket no. 70, at 12-14. AEIC states that a CGLC policy "provides basic or mainstream protection to businesses for claims resulting from their ordinary business activities." Id. at 13 (citing Stempel on Insurance Contracts, § 14.01 at 14-8, 9, 12 (3d Ed. 2006)). AEIC contrasts the CGLC policy with its own BOP policy, which provides "some overlapping coverage" but "is clearly a different policy, and includes coverages different from the CGL policy." Id. at 13. In addition, AEIC notes the significant disparity between the premiums for the two policies: the cost of Admiral's CGLC policy was $18,000.00, while AEIC's BOP policy covering

approximately the same period cost only $822.00. Finally, AEIC relies on the declaration of Patty Schuermeyer, a former Safeco underwriter who was assigned to the Interior Motives account, who states that the "[r]isks insured under the BOP differ greatly from the risks insured under a CGL because the CGL insured are generally engaged in higher risk activities." Docket no. 59, ¶¶ 2, 4, 7. Thus, AEIC reasons, the nature of the policies and their respective costs indicate that Admiral's CGLC policy was intended to provide primary coverage, while AEIC's narrower BOP policy was intended only to be excess.

In response, Admiral argues that AEIC's BOP policy coverage is the same for the liability at issue in this case. Admiral notes that the courts have described "primary insurance" simply as coverage that applies after the occurrence of an event covered under the terms of the policy. See Diaz v. Nat'l Car Rental Sys. Inc., 143 Wn.2d 57, 62 (2001) ("'Primary insurance' is defined as '[i]nsurance that attached immediately on the happening of a loss.'"); Safeco Ins. Co. of Illinois v. Automobile Club Ins. Co.,108 Wn. App. 468, 479 (2001) ("Primary policies are exactly that, the first line of defense in the event of accident or injury"); Highlands Ins. Co. v. Continental Casualty Co., 64 F.3d 514, 520 (9th Cir. 1995) (primary insurance is coverage that attaches immediately upon the happening of an occurrence that is covered under policy) (citing California state law). Admiral also argues that the relevant coverage clauses in both policies are nearly identical. Admiral is correct. As shown in the table below, the "coverage" language in both policies is virtually identical:

AEIC's BOP Policy	**Admiral's CGLC Policy**
We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . "property damage" . . . to which this insurance applies. Knowles Decl., at Ex. A (pp. 832, 909, 1011).	We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . "property damage" to which this insurance applies. Duany Decl., at Ex. A (Admiral Policy No. A00AG08147 at CG 00 57 09 99)

AEIC does not provide an explanation of how, in light of the cited language, its BOP policy is strictly excess. Indeed, AEIC acknowledges that "there is some overlapping coverage." Third-Party Defs.' Opp., at 13. And although AEIC is correct that its BOP policy provides *some* different coverage, the relevant question is whether the BOP policy included coverage that triggered AEIC's duty to defend and indemnify such that Admiral might bring a claim for contribution. AEIC fails to provide any authority for the proposition that disparate insurance premiums necessarily render the more costly policy primary and the less costly policy excess. Finally, while the Schuermeyer declaration states generally that the scope of coverage and premiums differ between BOP and CGLC policies, Schuermeyer stops short of stating that AEIC's BOP coverage does not overlap with Admiral's CGLC policy. AEIC's argument that the types of policies (BOP versus CGLC) establish, as a matter of law, that its coverage was not "primary" is without merit.

B. The CGLC Policy's use of a "Primary Insurance" Limitation

Next, AEIC argues that Admiral's "Other Insurance" clause has no effect because that clause renders Admiral's policy excess only if the other insurance available to MVLLC/HCI was "primary." Id. at 11-12. The clause at issue states as follows:

> This insurance is excess over:
>
> (1) Any of the other insurance, whether primary, excess or contingent or on any other basis:
>
> (a) That is fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work."
>
> . . .
>
> (2) Any other ***primary Insurance*** available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

Duany Decl., at Ex. A (CG 00 01 07 98) (emphasis added).

In contrast, AEIC's "Other Insurance" clause does not include a "primary" qualifier. AEIC's policy is rendered excess "[i]f there is other insurance covering the same loss or damage . . . whether [MVLLC/HCI] can collect on it or not." Id. at Ex. A (pp. 794,

925,1027). Therefore, AEIC reasons, Admiral's "Other Insurance" clause is *inoperative* because Admiral cannot establish that AEIC's BOP policy was "primary," while AEIC's "Other Insurance" clause is *operative* because it contains no "primary" qualifier.

In response, Admiral argues that the plain language of the AEIC BOP policy obligates AEIC to defend and indemnify upon the occurrence of a "property damage" event. See Coverage Comparison Table (above). Admiral maintains that any policy that triggers such obligations immediately is "primary." See Diaz , 143 Wn.2d at 62 ("'Primary insurance' is defined as '[i]nsurance that attached immediately on the happening of a loss.'"). As described above, Admiral's analysis of the language in both policies is correct. AEIC does not offer any alternative definition of "primary" insurance coverage, and the "property damage" coverage clause of AEIC's policy is virtually identical to Admiral's policy. AEIC's contention that its BOP policies were not "primary" is without merit.

C. AEIC's Reliance on Extrinsic Evidence to Define Its Policy

AEIC's third and final argument relies on extrinsic evidence regarding the type of coverage provided by its BOP policy. AEIC relies on an email exchange on March 27, 2001, between its underwriter and an insurance agent for Interior (who added MVLLC/HCI to the policy four months later). In the email, AEIC's underwriter wrote:

> Unfortunately, there is no way for us to add the primary additional insured and non-contributory wording onto our businessowner's policies. On the BOP, you need to look at how BP0009 (BOP Common Policy Conditions) reads under section H. "Other Insurance." Unlike the CGL "Other Insurance Clause," the BOP does not contain a primary provision. Basically, the BOP says that if other insurance exists for the same loss or damage, then the BOP is excess. So, if an additional insured (A/I) is added to the BOP by, say endorsement BP7032 (addl insd owners, lessees, contractors), then the BOP would be excess if the A/I's policy was primary. ***If the A/I's insurance has an excess provision where both our insured and the A/I's policy are excess (ie: both state they are excess for the loss), then each would likely pay on an "equal shares" bases due to the guiding principles.*** Note that defense is a big issue with additional insureds and the BOP is very clear that it "will provide no defense that any other insured has a duty to defend."
> . . .
>
> ***On the BOP, the A/I is – at best – sharing indemnity liability between A/I status on our policy and their own CGL. At worst, they have their A/I status***

> ***on our BOP to apply as excess insurance.*** Defense costs will not apply to the A/I on the BOP unless there is no other insurer with that duty. Bottom line, the BOP doesn't provide primary coverage for the additional insured who has their own, separate liability insurance policy.

Schuermeyer Decl., docket no. 59, Ex. A (AS 1194-96) (emphasis added).[2]

AEIC contends that this email aids in establishing that the parties to the insurance contract intended the BOP policy to be excess only, and not to include primary coverage. See Berg v. Hudesman, 115 Wn.2d 657, 63-64 (1990) (ambiguity in the meaning of contract language need not exist before evidence of the circumstances surrounding the making of the contract may be admissible, but unilateral or subjective purposes and intentions about the meaning of what is written is not evidence of the parties' intentions); Lynott v. Nat'l Union Fire Ins. Co., 123 Wn.2d 678, 684-85 (1990) (applying the Berg rule in the context of interpreting an insurance contract). In its briefing, AEIC repeatedly asserts that it is clear from the BOP policy and extrinsic evidence that AEIC "has no duty to defend any insured under the policy if another insurance company is defending the lawsuit." See e.g., Third-Party Defs.' Opp., at 10.

AEIC's arguments are without merit for several reasons. First, AEIC's suggestion that it does not have a duty to defend if another company is "defending" is contradicted by the language of its policy, which actually states "[w]hen this insurance is excess, we will have no duty . . . to defend any claim or 'suit' that any other insurer *has a duty to defend*." Knowles Decl., at Ex. A (pp. 794, 925, 1027) (emphasis added).[3] Having a duty to defend and actually defending are two different things where, as here, the defending insurance company (Admiral) did so under a reservation of rights. Admiral continues to maintain that it had no duty to defend. Second, the Berg context rule does not allow the Court to consider

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[2] Notably, in relying on the Schuermeyer email in their brief, AEIC omitted the emphasized language. See Third-Party Defs.' Mot., at 5-6.

[3] The "Other Insurance" policy language is identical for 2001-2002, 2002-2003, and 2003-2004.

extrinsic evidence where such evidence contradicts or modifies the language of the contract, and it does not allow the Court to consider the unilateral intentions of one party. AEIC fails to point to any specific term or clause of its BOP policy, the interpretation of which is aided by the extrinsic evidence. Finally, the unabridged version of the Schuermeyer email clearly contemplates the possibility that, where the "additional insured" (MVLLC/HCI) has a CGL with an "excess" provision, AEIC may have to share in the costs. Thus, to the extent AEIC might rely on this extrinsic evidence, the evidence does not support its contention that the BOP policy was clearly and unequivocally excess.

In sum, AEIC has not established that the policy language or extrinsic evidence renders its BOP policy purely excess. AEIC cannot, therefore, show that it had no duty to defend or indemnify as a matter of law, and AEIC is not entitled to summary judgment on this basis.

D. Admiral's Cross-Motion for Judgment that its Policy is Excess

Admiral cross-moves for summary judgment, arguing that the Other Insurance clause of its CGLC policy renders the policy purely excess. Admiral relies on an "endorsement" to its CGLC policy that states as follows:

> It is agreed that any independent contractors utilized by you shall have in force insurance of the type described in the schedule below and with limits of liability for such insurance equal to or greater than those shown in the schedule.
>
> It is further agreed that, subject to the above, such insurance as is provided by this policy shall be excess over and not contributing with the insurance described in the schedule. The terms and conditions of the policy relating to "Other insurance" are amended accordingly.
>
> Coverage
>
> Commercial General Liability

Duany Decl., Ex. 1 (AD 66 03 01 95).

Admiral argues that this endorsement establishes that its CGLC policy was excess over AEIC's BOP policy. Admiral's logic appears to be as follows: (1) the endorsement contractually obligated MVLLC/HCI to obtain insurance "of the type described in the

schedule below" (i.e., Commercial General Liability) for subcontractors; (2) Interior was a subcontractor of MVLLC/HCI, so Interior must have obtained such insurance from AEIC in the form of the BOP policy because that was an obligation of MVLLC/HCI; and (3) Admiral's policy is therefore excess over the BOP policy because the endorsement states that "such insurance provided by this policy shall be excess over and not contributing with the insurance described in the schedule."

There are multiple flaws in this argument. First, the fact that MVLLC/HCI undertook the contractual obligation to have their subcontracts obtain CGL insurance does not establish, and has no bearing on, the nature and scope of coverage *actually* supplied in such subcontractors' policies. In other words, the MVLLC/HCI promise to have subcontractors obtain primary CGL coverage does not mean Interior did so in this case; the terms of AEIC's BOP policy speak for themselves. Second, under the plain language of Admiral's endorsement, AEIC's BOP policy does not fall directly within the category of "insurance of the type described in the schedule." Although there is some overlapping coverage, the AEIC BOP policy is not the same as the "Commercial General Liability" policy listed in the schedule. As a result, Admiral's endorsement does not speak directly to whether its policy is rendered excess due to the existence of the BOP policy.

Admiral's contention that its policy is excess while AEIC's is primary is not supported by the policy language. Admiral's CGLC and AEIC's BOP contain virtually identical coverage clauses and similar "Other Insurance" clauses. Accordingly, Admiral's cross-motion for summary judgment is DENIED.

E. Admiral's Alternative Contention that the "Other Insurance" Clauses are Mutually Repugnant

In its response and cross-motion, Admiral raises the alternative argument that the two "Other Insurance" clauses cancel one another out, requiring AEIC and Admiral to share defense and indemnity costs. Docket nos. 61, 65, at 14-15. Admiral relies on Pacific Indemnity Company v. Federated American Insurance Company, in which the Washington

State Supreme Court addressed competing "excess insurance" clauses. 76 Wn.2d 449 (1969), overruled on other grounds, Mission Ins. Co. v. Allendale Mut. Ins. Co., 95 Wn.2d 464 (1981). In Pacific Indemnity, one person borrowed another's car with permission and had an accident. Id. at 249. The driver's insurance provided that her coverage was excess if she was driving the automobile of another, while the owner's insurance provided that his coverage was excess if another person was driving his automobile. Id. at 249-50. After the insurance companies disputed which would provide coverage, the Pacific Indemnity Court identified three possible solutions: (1) enforce both clauses, rendering each policy "excess" and providing no coverage; (2) designate the owner's insurance policy "primary" because it was his automobile and, thereby, disregard this policy's "excess" clause; or (3) deem the two clauses "mutually repugnant" and make both insurers liable for a *pro rata* share of the coverage. Id. at 250-251. The Court disregarded the first option because it would produce an "unintended absurdity," and it disregarded the second option because there was no basis to differentiate between the policies in identifying one or the other as "primary." Id. Thus, the Court applied the third option, holding that this option comported with the "general rule and weight of authority." Id. at 251 (citing 7 Am. Jur. 2d Automobile Insurance § 220, p. 545 (where two or more policies provide coverage for the particular event and all polices contain "excess insurance" clauses, it is generally held that such clauses are "mutually repugnant" and must be disregarded, rendering each company liable for a pro rata share of the judgment or settlement)).

AEIC offers no response to Pacific Indemnity and no direct opposition to Admiral's argument that, if the "Other Insurance" clauses conflict, the clauses effectively cancel each other out. Accordingly, the Court concludes that the inability of both AEIC and Admiral to demonstrate that their respective policies are not "primary" results in a presumption that they must share the defense and indemnity costs. Because this presumption applies, the Court must next address the issue of whether AEIC is entitled to summary judgment on the basis

that its $115,000.00 settlement with MVLLC/HCI precludes a contribution claim by Admiral.

II. Settlement as a Bar to Contribution Claims

AEIC's second central argument in support of its motion for summary judgment is that the law of equity precludes a contribution claim by Admiral where AEIC has previously entered a good-faith, reasonable settlement with MVLLC/HCI. AEIC maintains that its July 2005 settlement of $115,000.00 constitutes such a settlement and presently entitles it to a claim-bar order against Admiral. In opposition, Admiral first argues that claim-bar orders in contribution cases are not available under relevant case law. Admiral also contends that, even if principles of equity allow the use of such claim-bar orders, the value AEIC's settlement was too insignificant to be "reasonable" under the circumstances of this case.

A. Authority to Enter a Claim-Bar Order

The first inquiry is whether this Court has the legal authority to bar Admiral's claim for equitable contribution on the basis of AEIC's settlement with MVLLC/HCI. AEIC relies primarily on two unpublished cases from the Western District of Washington. See Zidell Marine Corp. v. Beneficial Fire and Casualty Ins. Co., Case No. 03-5131, docket no. 254 (W.D. Wash. May 24, 2004); Cadet Mfg. Co. v. Am. Ins. Co., Case No. 04-5411, docket no. 245 (W.D. Wash. March 30, 2006). In Zidell, the plaintiff and two insurance companies reached a settlement agreement that was contingent on Judge Leighton entering a claims bar order precluding non-settling insurers from seeking contribution or indemnity from settling insurers. Zidell Order, at 1-2. Judge Leighton stated: "as a general proposition, a court has the inherent equitable power to enter an order precluding subsequent claims for contribution (and indemnity) by non-settling parties in the litigation with notice of the proposed order, so long as their rights are protected by it." Id. at 2 (citing FED. R. CIV. P. 16(a), (c) and Franklin v. Kaypro Corp., 884 F.2d 1222, 1225-29 (9th Cir. 1189). Judge Leighton went on to address questions of whether the settlement was reasonable and whether the rights of the non-settling

defendants would be adequately protected. The Order noted that, after review, none of the non-settling defendants claimed or demonstrated that the settlement was unreasonable or that it was negotiated in anything less than good faith. Id. at 4. Judge Leighton also looked to the total policy limits and the total period of insurance as "reasonableness" factors, concluding that a comparison between the limits and settlement amount demonstrated that the settlement was reasonable. Id. at 5.

In Cadet, Judge Burgess addressed nearly identical issues in a motion for a claim-bar order regarding a settlement that had been subject to review by a bankruptcy court. Cadet Order, at 1-2. Citing Zidell, Judge Burgess concluded that the court had the "inherent equitable power to enter an order precluding subsequent claims for contribution and indemnity by non-settling parties." Id. at 2. The injured party's maximum claim in Cadet was estimated at $36 million, but it reached an agreement to settle for approximately $24 million, $10 million of which (42%) would be covered by the settling insurers. Thus, Judge Burgess noted that the non-settling insurers were potentially liable for the $14 million (58%) remainder on the judgment, but those insurers retained their coverage defenses. Id. at 4. Judge Burgess also took note that, even if liable for coverage, the non-settling insurers were free to later contest their *percentage* of liability. In other words, even if they could not seek contribution from the settling insurers, the non-settling insurers could still argue that their coverage responsibility was less than the $14 million on the settlement, requiring the injured party to absorb the shortfall. Id. at 4-5. AEIC contends that, as in Zidell and Cadet, this Court has the inherent equitable authority to enter a claim-bar order in AEIC's favor.

In opposition, Admiral contends that AEIC's counter-claim for a bar order is precluded under Fireman's Fund Insurance Company v. Maryland Casualty Company, 65 Cal. App. 4th 1279 (1998). In Fireman's Fund, a construction company was sued for condominium defects and was potentially covered for the liability by two insurers—Fireman's Fund and Maryland Casualty. Id. at 1287-88. Fireman's provided a defense under

a reservation of rights, while Maryland declined to provide any defense or coverage. Id. The construction company then brought suit against Maryland for refusing to defend, which was eventually settled with a release of all claims by the construction company. Id. at 1288. Fireman's then brought reimbursement/contribution/indemnity claims against Maryland for defense costs. On a motion for summary judgment, Maryland argued that Fireman's claim was essentially one of equitable subrogation (i.e., Fireman's was attempting to take the construction company's place in litigating the defense and indemnity coverage issues). Id. Fireman's argued that its contribution claim was distinct from equitable subrogation. Id. The trial court agreed with Fireman's, and Maryland appealed the ruling.

The "principal issue" identified by the California Court of Appeals was as follows: "whether one insurer's claim against another for contribution of defending and settling a claim against the insured is based on the theory of equitable subrogation, and is therefore dependent on and limited by underlying rights of the insured, to which both insurers may be subrogated; or whether instead an insurer possesses a direct cause of action for equitable contribution entirely independent of the rights of the insured." Id. at 1288-89. In its briefing, Maryland conceded that "if subrogation applies, the judgment should be reversed . . . if not, then the judgment should be affirmed." Id. at 1289 n.1. Thus, the parties did not attempt to litigate, and the Fireman's Fund Court assumed in the opinion, that there was no possibility of a claim-bar order *even if* the Court determined that Fireman's claim was truly based on contribution. After a lengthy analysis not relevant to this case, the Fireman's Fund Court ultimately held as follows:

> We conclude that where two or more insurers independently provide primary insurance on the same risk for which they are both liable for any loss to the same insured, the insurance carrier who pays the loss or defends a lawsuit against the insured is entitled to equitable contribution from the other insurer or insurers, without regard to principles of equitable subrogation. As a corollary to this principle, we hold that one insurer's settlement with the insured is not a bar to a separate action against that insurer by the other insurer or insurers for equitable contribution or indemnity.

Id. at 301.

Admiral relies exclusively on Fireman's Fund, arguing that it is directly on point in holding that "one insurer's settlement with the insured is not a bar to a separate action against that insurer by the other insurer or insurers for equitable contribution." Id. Admiral also contends that AEIC's reliance on Zidell and Cadet is misplaced because those cases "fail to address the factual scenario at issue in this case—whether an action for equitable contribution exists against a settling insurer where that settling insurer wrongfully abandoned its insured leaving other carriers to foot the bill." Third-Party Pl.'s Opp., at 8 n.1.

Admiral's reliance on Fireman's Fund and attempt to distinguish Zidell/Cadet is not persuasive. The Fireman's Fund opinion focused on the distinction between equitable subrogation and contribution. Fireman's Fund did not address the related but separate issue of whether a potentially viable equitable contribution claim may alternatively be dismissed using a court's inherent equity power to enter a claim-bar order, which was precisely the issue in Zidell and Cadet. Nothing in Zidell or Cadet directly contradicts the holding in Fireman's Fund. In both cases, the courts were operating under the assumption that the non-settling insurers could bring a contribution claim, but the courts simply took a further step in determining whether a reasonable, good faith settlement that protected the non-settlers rights entitled the settlers to a claim-bar order. Accordingly, this Court now follows Zidell and Cadet in concluding that it has the inherent equitable power to enter a claim-bar order if AEIC can establish that its settlement was reasonable and reached in good faith.

B. Reasonableness of AEIC's Settlement with MVLLC/HCI

AEIC argues that its $115,000.00 settlement was reasonable because it had viable coverage defenses and its liability exposure was limited to Interior's work on the Project—namely, the tile work in the condominiums.[4] See Third-Party Defs.' Opp., at 18-

[4] Admiral does not respond to AEIC's contention that the $115,000.00 settlement is reasonable in light of the fact that AEIC was allegedly only insuring Interior's tile work on the Project.

19. AEIC also notes that Admiral has never alleged that AEIC negotiated the $115,000 settlement with MVLLC/HCI in bad faith. Finally, AEIC relies on the protections afforded to non-settling insurers that were identified by Judge Burgess, including Admiral's coverage defenses and potential reduction of its percentage of liability relative to AEIC. In response, Admiral argues that the $115,000.00 settlement was not reasonable under the circumstances because (1) at the time of the AEIC settlement, MVLLC/HCI had reached a $7.2 million with the Association; (2) the AEIC policies had coverage limits of $1 million dollars, while the Admiral and St. Paul policies had limits of $1 million and $5 million, respectively; and (3) AEIC did not contribute to the cost of defending MVLLC/HCI.

The "reasonableness" standard is vague and creates a close question in this case. On one hand, AEIC's argument that the settlement is reasonable in light of its (alleged) limitation on liability to Interior's tile work is un-rebutted, and Admiral may still argue that its percentage of liability for defense and indemnification costs is minimal or non-existent. On the other hand, Admiral is correct that, on its face, the settlement between AEIC and MVLLC/HCI appears disproportionately small given the AEIC policy limit of $1 million, the potential obligation to pay defense costs, and the total settlement of $6.4 million. Unfortunately, the record before the Court and the briefing is not well developed as to the reasonableness issue.[5] For example, AEIC does not point clearly to the portions of its policies that limit its liability to Interior's tile work alone, and it offers no evidentiary basis to support its argument that $115,000.00 is in the ballpark of its potential liability for the underlying state-court settlement. Similarly, Admiral offers no argument concerning the

[5] The Cadet Court had the benefit of a fully-litigated reasonableness issue arising out of the bankruptcy proceedings and, in Zidell, none of the non-settling defendants objected to the reasonableness of the settlement. The circumstances are not similar here because the reasonableness of the $115,000.00 settlement has had only cursory briefing.

potential scope of AEIC's liability under AEIC's policies. Accordingly, the Court DENIES AEIC's motion for summary judgment WITHOUT PREJUDICE.

CONCLUSION

Safeco's unopposed motion for summary judgment dismissal, docket no. 57, is GRANTED.

AEIC's motion for a summary judgment determination that it had no duty to defend or indemnify MVLLC/HCI under its BOP policies due to their "Other Insurance" clauses, docket no. 57, is DENIED.

Admiral's motion for a summary judgment determination that it had no duty to defend or indemnify MVLLC/HCI under its CGLC policy due to its "Other Insurance" clause, docket no. 65, is DENIED.

AEIC's motion for summary judgment on its counter-claim for a claim-bar order, docket no. 57, is DENIED WITHOUT PREJUDICE. The Court concludes that, under Cadet and Zidell, it has the inherent equity power to enter a claim-bar order but declines to reach the question of whether AEIC's $115,000.00 settlement was reasonable based on the record and briefing currently before the Court.

AEIC's motion to strike, docket no. 70, is DENIED IN PART AS MOOT as to the exhibits to the Duany declaration and GRANTED IN PART as to each of the factual assertions cited in Admiral's brief that are unsupported by citation to the record as required under FED. R. CIV. P. 56. The Court did not consider unsupported facts in ruling on these motions.

IT IS SO ORDERED.

DATED this 19th day of July, 2006.

Thomas S. Zilly
United States District Judge